Salmah bt Omar & Ors v Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–318 OF 1998
ZAKARIA SAM J
15 AUGUST 2011

Civil Procedure — Action — Disposal of action without trial — Disposal of case on point of law — Whether doctrine of right of survivorship for property held under joint tenancy could be applied to Muslims — Rules of the High Court 1980 O 14A

Land Law — Ownership — Claim for — Conveyance showed that deceased brothers held land as joint tenants — Whether doctrine of right of survivorship for property held under joint tenancy applied to Muslims — Whether joint tenancy recognised in Islamic law — Whether right of survivorship in conflict with Islamic law — Whether right of survivorship should be applied with modifications — Civil Law Act 1956 s 6

Osman bin Mohamed ('Osman') and Omar bin Mohamed ('Omar'), two Malay Muslim brothers acquired a piece of land situated in Pulau Pinang ('the land'). The conveyance drawn up by the lawyer who acted for the brothers indicated that Osman and Omar held the land as joint tenants. On 1 March 1960, Omar died intestate leaving six children and a wife as beneficiaries to his estate under Islamic law. On 22 February 1962, Osman died with no issue but leaving his wife and his siblings as his beneficiaries under Islamic law. An entry made in 1974 in the folio of the interim register showed that Osman was the sole owner of the land. The register also reflected that on 14 February 1976, when Siti Zauyah bt Mohamad ('Siti') was granted letters of administration to the estate of Osman, the land was transferred to her name as administrator. Upon Siti's death, the first defendant was granted letters of administration and he then held the land as administrator. Thereafter the first defendant entered into a sale and purchase agreement to sell the land for a consideration of RM3,583,946.08. The plaintiffs, Omar's six children, claimed that joint tenancy was not recognised in Islamic law and that Osman and Omar held the land as joint owners with equal shares. The plaintiffs then instituted the present action wherein they sought, inter alia, a declaration that Omar and Osman were registered owners of the land and an order for the land titles register to be rectified so as to reflect that Osman and Omar were joint owners with equal shares in the land. The first defendant argued that since Osman and Omar held the land as joint tenants the right of survivorship would apply such that when Omar died Osman automatically became the owner of the property, as

reflected in the interim register. The parties agreed that the sole issue for consideration in this case was the issue of law as to whether the doctrine of right of survivorship for property held under joint tenancy applied to Muslims.

Held, allowing the plaintiffs' claim with costs to be taxed:

(1) In Islam, ownership could not be uncertain, limited in point of time or not heritable. A Muslim did not have the legal capacity to impose a condition that limited ownership on an uncertain event and this was a violation of Quranic injunction and the hadith. The doctrine of the right of survivorship could not be applied to Muslim inhabitants in the straits settlement where their personal law did not allow for creation of ownership limited in time. It would have been unfair that the issues of Omar as his Quranic heirs should be deprived of their legitimate right to his share of the property all because of the alien practice of joint tenancy. Further, the proviso to s 6 of the Civil Law Act 1956 also clearly indicated that the principle of the right of survivorship would only be applied with modifications as were necessary to prevent it from operating unjustly and oppressively (see paras 13, 19–21 & 23).

(2) There was also an element of chance in joint tenancy in that it was a gamble as to which owner predeceased the others before the final survivor became the sole owner. This was the basis of gambling and it was prohibited in Islam (see para 37).

(3) In Shariah, a Muslim's wealth, upon his demise should be distributed among the heirs according to the laws of Allah SWT ie the *faraid*. Be that as it may, since Omar had signed the conveyance, this court found that Omar had bequeathed one-third of his property to Osman. As such, it was ordered that two-thirds of Osman's shares in the land be returned to Omar's heirs according to *faraid* (see paras 40–41).

[Bahasa Malaysia summary

Osman bin Mohamed ('Osman') dan Omar bin Mohamed ('Omar'), dua orang adik beradik Melayu beragama Islam memperoleh sebidang tanah yang terletak di Pulau Pinang ('tanah tersebut'). Pemindahhakkan dibuat oleh peguam yang bertindak bagi pihak adik-beradik tersebut menyatakan bahawa Osman dan Omar memegang tanah tersebut sebagai penyewa bersama. Pada 1 Mac 1960, Omar meninggal dunia tanpa wasiat meninggalkan enam orang anak dan seorang isteri sebagai benefisiari kepada harta pusakanya di bawah undang-undang Islam. Pada 22 Februari 1962, Osman meninggal dunia tanpa anak tetapi meninggalkan isterinya dan adik beradiknya sebagai benefisiari di bawah undang-undang Islam. Satu pemasukan dibuat pada 1974 di dalam folio daftar sementara menunjukkan bahawa Osman merupakan pemilik tunggal tanah tersebut. Daftar tersebut juga menunjukkan bahawa pada 14 Februari 1976, apabila Siti Zauyah bt Mohamad ('Siti') diberikan

surat-surat pentadbiran kepada harta pusaka Osman, tanah tersebut telah dipindah milik kepada namanya sebagai pentadbir. Selepas kematian Siti, defendan pertama diberikan surat-surat pentadbiran dan dia kemudian memegang tanah tersebut sebagai pentadbir. Kemudian defendan pertama memasuki perjanjian jual beli untuk menjual tanah tersebut bagi balasan sebanyak RM3,583,946.08. Plaintif-plaintif, enam orang anak Omar, menuntut bahawa penyewaan bersama tidak diakui di bawah undang-undang Islam dan bahawa Osman dan Omar memegang tanah tersebut sebagai pemilik bersama dengan bahagian sama rata. Plaintif-plaintif kemudian memulakan tindakan ini di mana mereka memohon, antara lain, satu deklarasi bahawa Omar dan Osman adalah pemilik berdaftar tanah tersebut dan satu perintah untuk daftar hak milik tanah dibetulkan untuk menunjukkan bahawa Osman dan Omar adalah pemilik bersama dengan bahagian sama rata di dalam tanah tersebut. Defendan pertama menghujah bahawa oleh sebab Osman dan Omar memegang tanah tersebut sebagai penyewa bersama, hak kemandirian (*right of survivorship*) akan beraplikasi di mana apabila Omar meninggal dunia Osman secara automatik menjadi pemilik tanah tersebut, seperti yang terdapat di dalam daftar sementara. Pihak-pihak bersetuju bahawa satu-satunya isu untuk dipertimbangkan di dalam kes ini adalah isu undang-undang, sama ada doktrin hak kemandirian bagi hartanah yang dipegang di bawah penyewaan bersama beraplikasi kepada orang Islam.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos untuk ditetapkan:

(1) Dalam Islam, hak milik tidak boleh menjadi tidak tentu, terhad kepada tempoh atau tidak boleh diwarisi. Seorang yang beragama Islam tidak mempunyai kapasiti dari segi undang-undang untuk meletakkan syarat bahawa hak milik terhad bagi kejadian yang tidak tertentu dan ini adalah percanggahan injunksi al-Quran dan hadith. Doktrin hak kemandirian tidak boleh beraplikasi kepada orang Islam di negeri-negeri selat di mana undang-undang peribadi mereka tidak membenarkan pengwujudan pemilikan yang terhad tempohnya. Ia akan menjadi tidak adil bagi waris-waris Omar sebagai waris dalam al-Quran akan kehilangan hak sah mereka kepada bahagian hartanah hanya kerana amalan tidak biasa penyewaan bersama. Selanjutnya, proviso kepada s 6 Akta Undang-Undang Sivil 1956 secara jelas menunjukkan bahawa prinsip hak kemandirian hanya akan beraplikasi dengan perubahan setakat yang perlu untuk menghalangnya daripada bertindak secara tidak adil dan menindas (lihat perenggan 13, 19–21 & 23).

(2) Terdapat juga unsur nasib dalam penyewaan bersama yang merupakan perjudian di mana pemilik yang meninggal dunia sebelum yang satu lagi, orang terakhir yang masih hidup menjadi pemilik mutlak. Ini adalah asas perjudian dan ia adalah dilarang dalam Islam (lihat perenggan 33).

(3) Dalam Syariah, harta benda seorang Islam, selepas kematiannya sepatutnya diagihkan antara waris-warisnya menurut undang-undang Allah SWT iaitu *faraid*. Walau bagaimanapun, oleh sebab Omar telah menandatangani pemindahhakkan, mahkamah ini mendapati Omar telah mewariskan satu pertiga hartanahnya kepada Osman. Oleh demikian, diperintahkan bahawa dua pertiga daripada bahagian Osman di dalam tanah tersebut dipulangkan kepada waris-waris Omar menurut *faraid* (lihat perenggan 40–41).]

Notes

For cases on claim for ownership, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3889–3897.

For cases on disposal of action without trial, see 2(1) *Mallal's Digest*(4th Ed, 2010 Reissue) paras 139–168.

Cases referred to

Azizunissa Abdurrahman Kadri v Jamila Abdul Hussein Shaikh (deceased by her LRs) & Ors 2007 NOC 2238 (Bom); 2007 (4) Bom CR 769, HC (refd)

Haji Taib v Ismail [1971] 2 MLJ 36 (refd)

Khoo Hooi Leong v Khoo Chong Yeok [1930] AC 346, PC (refd)

Leonard v Nachiappa Chetty (1923) 4 FMSLR 265, HC (refd)

Malayan Banking Bhd v Ya'kup bin Oje & Anor [2007] 6 MLJ 389; [2007] 5 CLJ 311, HC (refd)

Mohamed Jusab Abdulla v Fatamabai Jusab Abdulla AIR (35) 1948 Bombay 53, SC (refd)

Sardar Nawazish Ali Khan v Sardar Ali Raza Khan 1948 75 LR IA 62, SC (refd)

Shafeeg bin Salim Talib and another v Fatimah Bte Abud bin Talib and others [2010] 2 SLR 1123; [2010] SGCA 11, CA (refd)

TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin [2006] 5 MLJ 217; [2006] 5 AMR 31, FC (distd)

Tan Chew Hoe Neo v Chee Swee Cheng & Ors [1926] SSLR 60 (refd)

Yeap Cheah Neo and others v Ong Cheng Neo (1875) LR 6 PC 381 (refd)

Legislation referred to

Civil Law Act 1956 ss 3, 6
Land Titles Act 1994 [SG]
National Land Code
Rules of the High Court 1980 O 14A

Fathima bt Mohd Idris (Idris & Associates) for the plaintiff.

Ajmer Singh Sandhu (Joshua Narendran with him) (Ajmer, Sandhu & Ong) for the first defendant.

Mohd Ilmani bin Ahmad (Senior Federal Counsel, Penang State Legal Advisor Office) for the second defendant.

Zakaria Sam J:

THE CLAIM

[1] The plaintiff took out this suit for the following prayers:

(a) a declaration that the entry in the folio of the interim register showing that Osman bin Mohamed as the registered owner of the land contained in Geran Mukim 1168 and known as Lot 7576, Mukim 12, Daerah Barat Daya, Permatang Damar Laut, Pulau Pinang ('the said land') is null and void;

(b) a declaration that Omar bin Mohamed and Osman bin Mohamed are the registered owners of the said land; and

(c) to rectify the registrar to register Osman bin Mohamed ('deceased') and Omar bin Mohamed ('deceased') as joint owners with equal shares in the said land and to cancel the entries of Zauyah bt Mohamed and Ahmad Rosli bin Aziz as administrators pursuant to Presentation No 204A/98 Vol 2 Vol 60 in the Penang Land Office records in respect of the said land.

AGREED FACTS

[2] Parties have agreed to the following facts:

(a) by an indenture dated 23 April 1954 Osman bin Mohamed ('Osman') and his elder brother Omar bin Mohamed ('Omar') in consideration of the sum of RM1,700 paid to the vendors acquired all the land known as Lot 167 (2) Mukim 12, Daerah Barat Daya, Pulau Pinang comprised in Geran No 2416;

(b) the replacement title for the said land is Lot No 7576, Mukim 12 Permatang Damar Laut, Daerah Barat Daya, Pulau Pinang comprised in Geran Mukim No GM 1168;

(c) both Osman and Omar were Malay Muslims of the Shafie mazhab;

(d) Omar died intestate aged 51 years on 1 March 1960 leaving behind seven children who are the plaintiffs, and a wife as beneficiaries to his estate under Islamic law. At the time of his death the plaintiffs were aged 21, 19, 14, 11, nine, seven, and six years old respectively;

(e) Osman died intestate aged 45 years on 22 February 1962 leaving behind his siblings and a wife as his beneficiaries under Islamic law namely Bakar bin Mohamed, Nah bt Mohamed, Aishah bt Mohamed, Sun bt

Mohamed, Itam bt Mohamed, Siti Zauyah bt Mohamed, Che Yah bt Mohamed and Siti Rokiah bt Mohamed;

(f) Osman and his wife did not have any children;

(g) in around 1974 the Director of Land Titles Penang entered Osman's name as the sole owner of the said land in the interim register;

(h) on 14 February 1976 letters of administration to the estate of Osman was given to Zauyah bt Mohamed and the said land was transferred to her name as administrator on 10 February 1977;

(i) after Siti Zauyah bt Mohamed's death, letters of administration was granted to the first defendant and he held the said land as the administrator;

(j) by a sale and purchase agreement dated 24 December 1996, the first defendant as the administrator sold the said land to Zantalite Enterprise (M) Sdn Bhd for a consideration of RM3,583,946.08;

(k) on 9 June 1997 and 30 May 1998 the sixth and seventh plaintiff had filed private caveats against the said land. On 27 May 1998 the plaintiffs instituted this suit; and

(l) on 19 January 2000 this High Court ordered that the balance consideration for Lot 7575 Geran Mukim No 1168 for the sum of RM3,225,551.47 is to be kept by Messrs Ajmer Singh Sandhu & Ong as stakeholders until the final disposal of this suit.

AGREED ISSUE

[3] Parties have agreed for the court to decide under O 14A of the Rules of the High Court 1980 on the following issue of law:

> Whether the doctrine of right of survivorship under English common law for property held under joint tenancy applies in this case.

THE PLAINTIFF'S SUBMISSION

[4] The plaintiffs' submissions are as follows:

(a) joint tenancy is not recognised in Islamic law since ownership is heritable and unrestricted in point of time;

(b) English common law was introduced with the provisio that it would only be applicable as long as it does not bring about injustice or oppression; and

(c) equity vies joint tenancy as odious and will find ways to treat it as a

tenancy in common.

THE DEFENDANT'S SUBMISSION

[5] The defendant's submissions are as follows:

(a) The principle of joint tenancy is embodied in various Ordinances and the National Land Code (Penang and Malacca Titles) Act 1963 and hence that is the authority for joint tenancy and not the common law;

(b) statue law overrides Islamic law and they rely on the case of *Shafeeg bin Salim Talib and Another v Fatimah Bte Abud Talib and Others* [2010] SGCA 11; and

(c) joint tenancy is not in conflict with Islamic law.

WHAT IS JOINT TENANCY

[6] Joint tenancy is a form of vesting title to property owned by two or more persons, in equal interest, subject to the right of survivorship in the surviving joint tenant(s). Title must have been acquired at the same time, by the same conveyance, and the document must expressly declare the intention to create joint tenancy estate.

[7] The right of survivorship means that when one of the co-owners dies, the surviving co-owner automatically becomes the owner of the asset regardless of the terms of the deceased party's will. This implies that with the right of survivorship, any property owned by the deceased will be passed to the survivor by virtue of the way the property is owned and not under the terms of a will.

EQUITY AND JOINT TENANCY

[8] Equity disapproves joint tenancy as equity is more concerned to achieve fairness. Megarry and Wade in their book *The Law of Real Property* (5th Ed), 1984 explains at p 419. 'The right of survivorship of a joint tenancy is often unsuitable for beneficial owners because it introduces an element of chance'. Equity sought to avoid 'the gamble of the tontine' that comes with the doctrine of survivorship.

[9] In the case of *Tan Chew Hoe Neo v Chee Swee Cheng & Ors* [1926] SSLR 60 at p 97 Reay J, explained how equity viewed joint tenancy:

> I cannot refrain from some comment, however short and inadequate, on the drawbacks of the English common law rule regarding joint tenancies. this has its roots in the feudal system of land tenure, and the courts of equity have from very early days in case after case attempted to relieve unfortunate sufferers from its unfair

> results. 'A joint tenancy', said Lord Cowper, 'is a thing odious in 'Equity', and if it is odious in England, what term is to be applied to it here in dealing with asiatics? A solicitor in this country who advises or assists a client to become a joint tenant, except as bare trustee, is accepting a very grave responsibility.

ISLAMIC LAW ON JOINT TENANCY AND THE RIGHT OF SURVIVORSHIP

[10] There is no joint tenancy in Islamic law, which considers ownership as a group of rights which by its definition is heritable and unrestricted in point of time. The notion of limited duration cannot be attached to ownership. Under Islamic law, the owner of property cannot limit his ownership to the duration of his life. Such a condition would be void, and the property would go to his heirs upon his death — see *Muslim Law, The Personal Law of Muslims In India And Pakistan* by Faiz Badruddin Tyabji, 1968 in (4th Ed), at pp 448–450.

[11] On the question of restricting ownership by reference to time, the Privy Council in *Sardar Nawazish Ali Khan v Sardar Ali Raza Khan* 1948 75 LR IA 62 at p 77 explained:

> In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law … and no decision of this Board which affirms that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estate in fee simple, in tail, for life, or in remainder. What Muslim law does recognise and insist on, is the distinction between the corpus of property itself (*ayn*) and the usufruct in the property (*manafi*). Over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property, and the dominion over the corpus takes effect subject to any such limited interests.

[12] According to *Mulla Principles of Mahomedan Law* by M Hidayatullah (19th Ed), 1990 at p 26.

> There is no joint tenancy in Mahomedan law and the heirs are only tenants-in-common.

APPLICATION OF LAW TO THE FACTS HERE

[13] In this case the conveyance was executed by Omar and Osman, two Muslim brothers. They are bound by the teachings of the al-Quran and hadith. In Islam ownership cannot be uncertain, limited in point of time and not

heritable. A Muslim does not have the legal capacity to impose condition limiting ownership on an uncertain event, this is a violation of Quranic injunction and the hadith.

[14] The conveyance was drawn up by a lawyer trained in English law. Nothing on the face of the document indicates that the effect of joint tenancy was explained to Omar and Osman. There was no evidence that both of them could read or understand English. Neither was there evidence that the said documents were explained to them in Bahasa Malaysia, the language they both understand.

[15] Once again I turn to Reay JC who has taken pains in reminding practitioners on the need to understand local conditions when applying English law. In *Leonard v Nachiappa Chetty* (1923) 4 FMSLR 265 at pp 267–268 the learned judge said:

> Counsel for the plaintiff relied chiefly on the English law. Counsel for the defendant not only argued entirely on English law, but stated that he did not know what the local procedure was. This places me in a difficult position. A whole chapter of the Civil Procedure Code is devoted to the subject … and that is the law which I am bound to apply. Before reliance can be placed on English decisions, particularly decisions on points of procedure, it is necessary in the first instance to examine carefully our local law and to ascertain what it is and in what respect it resembles or differs from the English law. This seems a self-evident proposition, but it is nevertheless too often overlooked by counsel.

RECEPTION OF ENGLISH LAW

[16] Principles of common law and equity were formally introduced in Penang by the first charter of justice in 1807 with the proviso that 'as far as local circumstances will admit'. The British did not apply English law in this country without modification, they stressed 'the need to respect the customary law of the non-British Asian inhabitants who professing different religions, and using and having different religions and using and having different manners, habits, customs, and persuasion, had settled there' — see *Judith Sihombing's National Land Code A Commentary* at p 3. See also *Yeap Cheah Neo and others v Ong Cheng Neo* (1875) LR 6 PC 381 at p 392.

[17] English principles were not used when they would not be applicable to the local inhabitants and would cause unfairness and injustice. As observed by Lord Russell of Killowen in *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346 at p 355, that:

> The modifications of the law of England which obtain in the colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell CJ in *Choa Choon Neo v Spottiswoode*; and this Board in *Yeap Cheah Neo v Ong Cheng Neo*, stated that in Sir Peter Maxwell's judgment. 'The rules of English law and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the colony are correctly stated'.

[18] This principle was given statutory force in the proviso to s 3 of the Civil Law Act 1956 which provides that:

> The said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

[19] In the light of this, I am persuaded to hold that the doctrine of right of survivorship cannot be applied to Muslim inhabitants in the straits settlement where their personal law does not allow for creation of ownership limited in time. Omar and Osman would not have had the legal capacity to impose such a condition limiting ownership on an uncertain event.

[20] It would have been very unfair that the issues of Omar as his Quranic heirs be deprived of their legitimate right to his share of the property all because of the alien practice of joint tenancy.

[21] My attention is also drawn to the proviso to s 6 of the Civil Law Ordinance No IV of 1878 and s 6 of the Civil Law Ordinance No VIII of 1909 applicable in the straits settlement which reads:

> Provided that nothing herein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immoveable property, or any estate, right or interest thereon.

[22] This same proviso is now found in s 6 of the Civil Law Act 1956. In *Haji Taib v Ismail* [1971] 2 MLJ 36, Syed Agil Barakbah J (as he then was) expressed that (at p 38):

> The provision of s 6 clearly prohibits the introduction into the Federation or any States comprised therein of any part of the law of England relating to tenure. Tenure means the mode of holding or occupying land or the manner of possession.

[23] This to me, clearly indicates that the principle of right of survivorship

would only be applied over here with modifications as are necessary toprevent it from operating unjustly and oppressively.

THE DEFENDANT'S CONTENTION

[24] The first defendant contends that the principle of right of survivorship has statutory force and is not based on common law and that statute will override Islamic law.

[25] But it has to be pointed out that parties have agreed that the point for determination in this case is 'whether the doctrine of right of survivorship under English common law for property held under joint tenancy applies in this case', and that is what I have to decide upon.

[26] The first defendant has named various ordinances that is, the Boundaries Ordinance 1884, the Crown Lands Ordinance No II 1886, the Conveyancing Ordinance No IV of 1886, the Registration of Deeds Ordinance No XIII of 1886, Conveyancing and Law of Property Ordinance 1886 and the National Land Code (Penang and Malacca Titles) Act 1963 (which is also being relied by the second defendant).

[27] However all these ordinances and the act they have quoted dealt with registration of deeds, conveyancing, survey etc they did not codify the law on joint tenancy.

[28] This was not the case in *Shafeeg*'s case relied upon by the first defendant.

[29] In *Shafeeg*'s case the conveyance was registered under the Land Titles Act 1994 of Singapore, which incorporated the English doctrine of survivorship. It provides for change of ownership when one tenant predeceases the other. There is no such equivalent in our statutory law for this.

[30] The first defendant have also referred to the case of *TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin* [2006] 5 MLJ 217; [2006] 5 AMR 31. However this case can be distinguished from the present case. In *TM Feroze Khan* the National Land Code had provisions on trust whereas the case at hand is about joint tenancy which is not recognised under the Land Code except in the case of trustees.

[31] One has to bear in mind that in the case of *TM Feroze* the Court of Appeal had found that there was properly constituted *hibah* there.

[32] Now, the first defendant have referred to two Indian cases, ie *Mohamed*

Jusab Abdulla v Fatamabai Jusab Abdulla AIR (35) 1948 Bombay 53 and *Azizunissa Abdurrahman Kadri v Jamila Abdul Hussein Shaikh (deceased by her LRs) & Ors* 2007 NOC 2238 (Bom); 2007 (4) Bom LR 769 to support their contention that joint tenancy is not in conflict with Islamic law.

[33] *Mohamed Jusab* was followed in *Azizunissa*'s case. In *Mohamed Jusab*'s case the court had rhetorically asked 'is there anything in Mohamedan law which is repugnant to the creation of a grant of joint tenancy if the parties so desire it?' The court then answered saying it could find nothing repugnant but had failed to consider the gharar (uncertainty) element in joint tenancy. The court failed to consider the element of chance in joint tenancy where it is a gamble as to which owner predeceases the other's before the final survivor becomes the sole owner. This is the basis of gambling and it is prohibited in Islam. The court also failed to consider that the shariah only recognise absolute dominion over corpus of the property, heritable, and unrestricted in point of time. This would be contrary to joint tenancy since the dominion is of limited duration and a person cannot will his right to the property under a will.

[34] As explained by Hamid Sultan Abu Backer JC, in *Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 6 MLJ 389 at p 400; [2007] 5 CLJ 311 at p 325:

> Islamic law of commercial transaction fundamentally is rooted on the premise of total eradication ofriba and gharar (uncertainty).

[35] This aspect of Islamic law was not considered in *Jusab*'s case.

[36] The prohibition against joint tenancy is also clearly explained in the article *Joint Tenancy with the Right of Survivorship and Syariah: A Brief Discussion by the Islamic Banking and Finance Institute Malaysia's*, The 4E Journal January 2006 (at pp 47–48) where it was explained as follows:

> The joint tenancy is the concept of joint ownership of uncertainty itself since the fundamental nature of the ownership of joint tenants' property is communal ownership. Each joint tenant has an interest in the whole but does not enjoy an exclusive right to any part thereof. In other words, the interest of joint tenants is unspecified. This is the strongest reason for its prohibition, since as what was elaborated before, the essence of joint tenancy is unity of ownership.
>
> From the aforementioned feature of joint tenancy, it is clear that the main criterion for condemnation of the contract of joint tenancy under syariah is the involvement of gharar. The occurrence of gharar in the contract of joint tenancy is due to the Jahalah element. From fiqh perspective, the word jahalah is used to connote lack of knowledge. This implies that contracting under conditions of uncertainty is not permissible.

A The contract of conventional joint tenancy involves the jahalah element in the sense that no such tenant can claim that he or she has a definite portion of share,say one-third or one-fourth in the asset. There is no clear indication in the agreement of who owns how much of the property …

B Another concern with the concept of joint tenancy from the syariah point of view is the issue of the survivorship principle. Based on the current practice (which is based on common law), in the event of death of one joint tenant, the whole property will immediately be vested to the surviving tenants …

C In joint tenancy, according to the rules of inheritance, the estate and wealth of the deceased will be distributed amongst the heirs, whereas in syariah, a Muslim's wealth, upon deceased, should be distributed among the heirs according to the laws of Allah S.W.T. It is obligatory for every Muslim to follow the laws ofmirath (inheritance) or wasiyyah (will). To give all the leftover wealth to the particular surviving heirs without the proper and full consent of all the remaining heirs is not permitted.

D The same applies to case of wassiyyah, it is allowed if one wishes to make a wasiyyah for a non-relative, or charity, but only up to one-third of one's total wealth. The remaining two-third is to be distributed amongst the heirs according to the fixed portion as prescribed by Allah S.W.T. If one does not make a bequest, then all of the estate will be divided among the surviving heirs. As it readily apparent from a brief E discussion of the syariah standpoints towards the conventional joint tenancy with the right of survivorship described above, the current practice of joint ownership does not lend itself well to Islamic principles.

F **[37]** There is an also element of chance in joint tenancy where it is a gamble as to which owner predecease the others before the final survivor becomes the sole owner. This is the basis of gambling and it is prohibited in Islam.

[38] As acknowledged in *Sardar Nawazish*'s case at p 50, the Prophet was not G in favour of unlimited testamentary power. In our case, the predicament of Omar's children is best reflected by the advice of the Prophet to his follower: 'You may leave a third of your property by a will but third part, to be disposed of by will, is a great portion; and it is better you should leave your heirs rich than in a state of poverty, which might oblige them to beg of others'. According H to another of his sayings: 'God has allotted to every heir his particular right'.

[39] The decision in *Sardar Nawazish*'s case was given by the Privy Council where the confusion about the principle of ownership of property was clarified whereby it recognised that 'Muslim law admits only ownership unlimited in I duration, but recognises interests of limited duration in the use of property'. Unfortunately this authority was not referred to in *Jusab*'s case and I find it of no persuasive value.

[40] In Shariah, a Muslim's wealth, upon his demise, should be distributed

among the heirs according to the laws of Allah SWT ie the *faraid*. It is obligatory for every Muslim to follow the laws of inheritance or will. Even to give all the leftover wealth to the particular heir without the proper and full consent of all the remaining heirs is not permitted.

CONCLUSION

[41] Be that as it may, since Omar had signed the conveyance, I take it that Omar had bequested one third of his property to Osman. For that reason I ordered two third of his shares in the land to be returned to Omar's heirs according to *faraid*.

[42] For the above reasons I allowed the plaintiffs' claim accordingly with costs to be taxed unless agreed.

Plaintiffs' claim allowed with costs to be taxed.

Reported by Kohila Nesan